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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,

Petitioner

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF FREDERICK D. DISMUKE.

In replying to the Government's brief, petitioner wishes to emphasize his contentions that:

First. The annuity which he seeks is not a pension;

Second. The District Court has jurisdiction under the Tucker Act because the suit is based upon a contract, either express or "implied in fact," as distinguished from quasi contracts or contracts "implied in law";

Third. The District Court has jurisdiction under the Tucker Act because the suit asserts a claim founded upon a law of Congress;

Fourth. Petitioner's suit is not "brought to recover fees, salary, or compensation for official services";

Fifth. Congress never intended that the decision of the Bureau of Pensions, later the Veterans Administration, later the U. S. Civil Service Commission, should be final, especially where, as in this case, such decision is made on undisputed facts;

Sixth. Petitioner is not limited to a proceeding for mandamus;

Seventh. The Court properly rendered a declaratory judgment;

Eighth. On the merits of the case, petitioner as a field deputy marshal was an employee of the United States.

ARGUMENT.

The Annuity Which Petitioner Seeks is Not a Pension.

The relevency of this particular inquiry lies in the fact that the Tucker Act contains this provision:

> "Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as 'war claims', or to hear and determine other claims which had been rejected or reported on adversely prior to the 3rd of March, 1887, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; * * *."

In petitioner's brief in support of the petition for writ of certiorari, he stated, at page 16, that war claims, claims for pensions and claims for fees, salaries or compensation for official services of officers of the United States are excepted from the district court's jurisdiction but that the Government did not contend that the petitioner's claim falls within any of these exceptions. This statement, of course,

had reference to the Government's position in the District Court and in the Court of Appeals. The Government in this Court is contending that the annuity provided for in the Civil Service Retirement Legislation is a pension. Hence, the necessity for this reply brief.

In determining the meaning of a word used in a statute, the first reference should be to the statute itself. In the Civil Service Retirement Legislation it seems that Congress studiously avoided the use of the word "pension." The word "pension" is nowhere in the legislation used as a synonym for "annuity." The administration of the Retirement Act was for a while entrusted to the Commissioner of Pensions and, naturally, there are repeated references in the Act to the Commissioner of Pensions but, except for such references, we think we are correct in saying that the word "pension" or "pensions" appears only twice in the entire Act as amended and codified in Title 5 of the United States Code. These two references are as follows:

> "—payment of all annuities, refunds, and allowances granted hereunder shall be made by checks drawn and issued by the disbursing clerk for the payment of pensions in such form and manner and with such safeguards as shall be prescribed by the Secretary of the Interior in accordance with the laws, rules and regulations governing accounting that may be found applicable to such payments (May 22, 1920 c. 195, Section 12, 41 Stat. 619, Title 5, U. S. C. Section 725);"
>
> "In the case of an employee who is eligible for and elects to receive a pension under any law, or compensation under the provisions of Chapter 11 of Title 38, the period of his or her military or naval service upon which such pension or compensation is based shall not be included for the purpose of assignment to classes defined in Sections 698 to 706 of this title, but nothing contained in Sections 691 to 693 and 697 to 731 of this title shall be so construed as to effect in

any manner his or her right to a pension, or to compensation under the provisions of chapter 11 of title 38, in addition to the annuity herein provided (May 22, 1920, c. 195 Section 3, 41 Stat. 615, Title 5 U. S. C. Section 707)."

The first quoted excerpt from the Act shows only that the Government designated one of its employees in particular, namely, the disbursing clerk for the payment of pensions, to draw the checks with which to pay these annuities. That is simply a matter of accounting. The second quoted excerpt from the Act shows clearly that Congress differentiated between pensions and annuities and stipulated that the same period of service should not be counted both for a pension and for an annuity.

We have not read all of the pension laws as embodied in a separate title of the United States Code, namely, Title 38, but as far as our reading of that title goes, we find that Congress always called a pension by its correct name and we do not find Congress referring to pensions as annuities, although it might have been proper to do so.

Now coming to that provision of the Tucker Act which is quoted above, we find that Congress excluded from the jurisdiction of the district courts "claims for pensions." We find too that such provision of the Tucker Act appears in the same part of the same sentence, and before the first semicolon of that sentence, which excludes from the jurisdiction of the courts "claims growing out of the Civil War, and commonly known as "war claims." The Tucker Act was passed on March 3, 1887, long before the Retirement Act which was passed on May 22, 1920. In 1887 neither the United States Government nor the Governments of the different states had made any progress in providing for the retirement of its employees upon annuities. Certainly the "pensions" referred to in the Tucker Act were pensions as they were known and understood at that time, and as

they were known and understood to the courts at that time.

This Court in 1857, in the case of *Walton* v. *Cotton*, 19 How. 355; 15 Law Ed. 658, in construing the Pension Acts of June 4, 1832, and July 4, 1836, said:

> "The pension is undoubtedly a bounty of the Government * * *"

and

> "Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered."

Again in the case of *U. S.* v. *Teller*, 107 U. S. 64, this Court said:

> "No pensioner has a vested right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion. *Walton* v. *Cotton*, 19 How. 355."

No doubt these are the pensions or the types of pensions to which Congress referred in the Tucker Act.

> "A pension is a gratuity only where it is granted for services previously rendered, which at the time they were rendered gave rise to no legal obligation."
> *O'dea* v. *Cook*, 169 Pac. 366(1).

Nomenclature is not always scientific. As was said by the late Justice Holmes:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."
> *Towne* v. *Eisner*, 245 U. S. 418.

Courts frequently have referred to retirement annuities as pensions, although, at the same time, holding that con-

tractual rights, property rights, and vested rights exist with reference to such so-called pensions.

> "A provision for a pension to police officers and their beneficiaries * * * in a sense becomes part of the contract of employment itself."
>
> 43 C. J. Page 813, Section 1407.

> "Like other pension laws, pension acts applicable to members of the police force will be liberally construed. The purpose of such acts is doubtless to promote efficiency and encourage continuity of service, and therefore they should be construed in harmony with this purpose. Acts granting police pensions are prospective in their operation, and are applicable to members of the police force who subsequently become members; but they are applicable to members of the police force at the time the provisions become effective, although such a construction makes them in a sense retrospective, as imposing upon the municipality duties and responsibilities arising out of past transactions. Acts granting police pensions do not govern cases where retired members of the force have died prior to their enactment, but this rule does not apply to an amendment which expressly or impliedly extends its provisions to beneficiaries under a former statute."
>
> 43 C. J. Page 813, Section 1408.

A police pension fund applies to all those who are in service when the law takes effect, although they serve a very short time thereafter before becoming entitled to its benefits.

> "Such pensions generally are not considered donations or gratuities."
>
> *People* v. *Abbott*, 274 Ill. 380, 113 N. E. 696.

> "In this aspect of the case, if no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. *Mead* v. *Inhabitants of*

Acton, 139 Mass. 341, 1 N. E. 413. But the relator continued in the service nine years after the law was enacted and thereby earned a right to his pension under that Act so long as it shall remain in force. The amendment of 1909 (increasing the amount to $50.00 per month) does not repeal the Act of 1895 so as to deprive the relator of his right to a pension, but, since he rendered the state no services subsequent to the enactment of that amendment, to increase his pension would violate Section 16, Article 3 of the Constitution. The fact that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time, does not make the legislation void. The constitutional limitations do not apply to such conditions."

State ex rel. Haberlan v. *Loue*, 89 Neb. 149; 131 N. W. 196.

We think the authorities above cited fully answer the Government's contention that this annuity is a pension in that the petitioner is given credit for services rendered prior to the date of the Retirement Act. Almost all retirement systems are in that particular retrospective in their operation. That does not make it a pension, however, nor does it eliminate the contractual element. (See *Retirement Board of Allegheny County* v. *McGovern*, 316 Pa. 161, 174 A. 401, 406.) The fact remains that after the effective date of the Retirement Act, petitioner came into the classified civil service at a time when the Government, through the retirement legislation, was saying to him: If you come into the classified civil service and continue to work for the Government, paying into the fund the amounts called for by the Retirement Act, you "shall be entitled," etc.

We think the authorities above cited also answer the Government's contention that $1650.00 paid by petitioner is insufficient to purchase an annuity of approximately $1200.00 per annum for a man of fifty-eight years of age.

Petitioner accepted the Government's offer, just as did the soldiers during the World War accept the Government's offer by contracting for War Risk Insurance under terms much more advantageous than they could have obtained from a private insurance company. The courts will not, in the absence of fraud or other special circumstances, inquire as to the adequacy of consideration. That, in substance, is what the Government is asking the Court to do. (See *Eyre* v. *Potter*, 15 How. 42, 60.)

The Government's brief argues that a claim for annuity "partakes of the nature of a pension" (page 8), is "in substantial part a pension" (page 8), "partakes more of the nature of a pension than a contract obligation" (page 16), and refers to "the pension element which exists in the claim" (page 18). It occurs to us that this argument does not get us anywhere. This annuity is either a pension or it is not a pension. The fact that it, in some respects, resembles a pension is not sufficient to exclude it from the jurisdiction of the District Court. We insist that it is not a pension because petitioner paid $1650.00 for it and because it is not granted entirely for past services, or even primarily for past services. The Retirement Act was primarily prospective in its operation and provided that all those who would thereafter do certain things and pay certain amounts would be entitled to the annuity. It only incidently provided that all those who in the future did certain things and paid certain amounts would be given credit, in computing the amount of the annuity, for services rendered prior to the passage of the Act.

We take it that there is no doubt about the fact that if A renders services voluntarily for B without expecting to be paid and later B says to A "I am giving you a promissory note for $100.00 in consideration of the services which you have heretofore rendered and in consideration of the services which you will hereafter render," the note is sup-

ported by a perfectly valid consideration, assuming that A continues to serve.

13 C. J. Page 362, Section 227.

> "Where an allowance is made out of hand, gratuitously, and purely for past services, by the Government, it is a pension, with the attributes of a pension; but where the employee contributes a part of his salary or wages with a sum from the state or county under a quasi contractual relationship with the municipality or state, creating a contributive reserve retirement system, the results are different. Retirement pay made therefrom is not a pension; the contributions by the Government from their very nature must be viewed in a different light."
>
> *Retirement Board of Allegheny County* v. *McGovern,* 316 Pa. 161, 174 A. 401, 405.

A foot note appended to the above quoted decision reads:

> The opinion of the Federal Supreme Court (*Lynch* v. *United States,* 54 S. Ct. 840, 78 L. Ed. 1434, decided June 4, 1934 (described the difference between War Risk Insurance and a pension; the former having the incidents of a contract (as retirement pay does here). The insurance fund is made up of contributions by the Government and the member, the Government paying the entire cost of administration. These engagements are held to be contracts."

II.

The District Court Has Jurisdiction Under the Tucker Act Because the Suit is Based Upon a Contract Either Express or "Implied in Fact" as Distinguished From Quasi Contracts or Contracts "Implied in Law"

We need not decide in this case whether petitioner's contract is an express contract or an implied contract. It is either an express contract or a contract implied in fact as

distinguished from one implied in law. The three types of contracts are defined in Black's Law Dictionary as follows:

> "An express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing."
>
> "An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter or reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding."
>
> "Implied contracts are sometimes subdivided into those 'implied in fact' and those 'implied in law', the former being covered by the definition just given, while the latter are obligations imposed upon a person by the law, not in pursuance of his intention and agreement, either expressed or implied, but even against his will and design, because the circumstances between the parties are such as to render it just that the one should have a right, and the other a corresponding liability, similar to those which would arise from a contract between them. This kind of obligation therefore rests on the principle that whatsoever it is certain a man ought to do that the law will suppose him to have promised to do. And hence it is said that, while the liability of a party to an express contract arises directly from the contract, it is just the reverse in the case of a contract 'implied in law', the contract there being implied or arising from the liability—but obligations of this kind are not properly contracts at all, and should not be so denominated. There can be no true contract without a mutual and concurrent intention of the parties. Such obligations are more properly described as 'quasi contracts'."

This is probably an express contract because its terms are all expressed in writing and are stated in distinct and explicit language.

It is a statutory contract. The Retirement Act constitutes the offer on the part of the Government; the rendering of services and the paying of money constitutes the acceptance on the part of petitioner.

> "The legislature, in effect, makes this offer to the employee; the state or municipality will contribute so much money to a fund and you will contribute to the same fund for a given time on the basis of service performed. Conditions or qualifications are added for the benefit of the fund and the employee. The right is given to the employee to cease payment and withdraw from the fund, recovering back his contributions, when his services end, under Section 324, Act of 1929 (16 PS, Section 324). It is difficult to understand where this relation lacks the elements of an executory contract if the employee or the state have directly or indirectly made any payments on account of it. (See *Lynch* v. *United States, supra*). The state and its agencies are as certainly bound by their contracts as are individuals."
>
> *Retirement Board of Allegheny County* v. *McGovern, supra.*

It is contented in the Government's brief that this is not a contract because there is lacking the element of mutual consent. This argument is fully answered by the following quotation from the case of *Retirement Board of Allegheny County* v. *McGovern, supra:*

> "The employees' contributions are as much wages or salary when deducted at the source as though they had been paid directly, and in Allegheny County they are paid directly. The legislation so recognizes this principle in that county and elsewhere when it permits the employee to withdraw under given circumstances from the association and take back his contribution as

salary. Both the funds the county or the state contributes are absolutely vested in the system that has been created by it except the right of withdrawal just discussed. To hold otherwise, for the reason that employee contributions are not wages when compulsorily deducted, would not only be unfair or unjust but would circumvent all known equities. Especially is this true when the interests of a retired employee in the reserves is denied after his salary has been made to contribute thereto for years, and he is beyond an age when his usefulness as a provider is intact. To take an amount or to require an amount to be paid from a salary is a deduction of part of the salary and not a reduction of salary. To take this earned salary and deny any vested right in it is against fair dealing."

We hardly see how the Government would be permitted to say that the element of mutual consent is lacking when it makes a deduction from the earned salary of the employee and is careful to preserve the earmarks of a contract or agreement. Section 9 of the Retirement Act, Title 5 U. S. C., Section 722, provides:

"Every employee coming within the provisions of Sections 691 to 693 and 697 to 731 of this title shall be deemed to consent and agree to the deductions from salary, pay, or compensation * * *."

In this connection it must be borne in mind that the amount deducted from the employee's salary was the property of the employee. In that regard, this case differs from the case of *Pennie* v. *Reis*, 132 U. S. 464, and the cases which follow it. Of such cases, the Supreme Court of Pennsylvania, in the case of the *Retirement Board of Allegheny County v. McGovern, supra*, said:

"Some states hold that the contributions of the employees are not salary inasmuch as the amount compulsorily contributed never reached them but was withheld by the state or municipality; and, therefore, a

member of a retirement or pension fund has no vested interest in such contributions, but the fund remains in the unrestricted and absolute control of the state or municipality which may seize and divert it entirely to any purpose deemed fit. This was held to be so even after the employee has qualified under a particular Act. If this is true, then the employee could not complain of the matter here involved. Such cases, however, involve statutes which do not give a right to the member to withdraw the amounts deducted from his salary because no part of the contributor's money is in the fund, but only public monies, and nearly all the cases involve changes by amendments to the laws, in what may be called 'actuarial' or business management features."

The Retirement Act specifically provides that if an employee in the civil service shall be transferred to an unclassified position, or if an employee under the civil service shall become separated from the service before becoming eligible for retirement on an annuity, "the total amount of deductions of salary, pay, or compensation with accrued interest computed at the rate of 4% per annum, compounded on June 30th of each fiscal year, shall, upon application, be returned to such employee." The Act also provides that if an "annuitant shall die without having received in annuities an amount equal to the total amount of the deductions from his or her salary, pay, or compensation, together with interest thereon at four per centum per annum compounded as herein provided up to the time of his or her death, the excess of the said accumulated deductions over the paid annuity payments shall be paid in one sum to his or her legal representatives upon the establishment of a valid claim therefor; and in case an employee shall die without having reached the retirement age or without having established a valid claim for annuity, the total amount of deductions with accrued interest as herein provided shall be paid to the legal representatives of such

employee." Title 5, U. S. C., Section 724. It will be seen, therefore, that the Act consistently recognizes the fact that the amounts deducted belong to the employee.

Moreover, we should bear in mind that it was apparently optional with petitioner whether he should remit to the Government the amount of $970.09 after his separation from the service in order to get the full benefit of the Retirement Legislation, the said amount representing deductions which would have been made from petitioner's salary after the passage of the Retirement Act in 1920 and prior to his becoming a civil service employee on March 1, 1928, had he been a civil service employee between those dates. The Act did not require that this deposit or payment be made. The language of the Act is:

> "Upon the transfer of any employee from an unclassified to a classified status, or upon the reinstatement of a former employee, credit for past service rendered subsequent to August 20, 1920, or for any part thereof, shall be granted only upon deposit with the Treasurer of the United States of the amount of such deductions with interest as provided in Sections 691 to 693 and 697 to 731 of this title, as would have been made for the periods of actual service, or part thereof, for which credit is to be given * * *. Failure to make such deposit shall not deprive the employee of credit for any past service rendered prior to May 22, 1920, and to which he or she would otherwise be entitled." (Title 5 U. S. C., Section 723.)

As stated on page 33 of the Government's brief, petitioner was permitted to make this deposit. He was not required to do so. The amount of this deposit is now in the possession of the Treasurer of the United States and petitioner holds receipt therefor (R. 16).

We fail to follow the reasoning in the Government's brief (page 14) to the effect that there is no obligation on the part of the United States in favor of the petitioner since

the Civil Service Retirement Act merely creates the fund out of which the annuity is to be paid. The civil service retirement and disability fund is not a barrier obstructing the legal relationship or the rights and duties existing between the Government and petitioner. This fund is not a corporation, partnership or person. It has no entity. It is merely a matter of bookkeeping. It is one of the Government's pockets in which it put the deductions withheld from petitioner's salary and the $970.09 which petitioner paid after the termination of his service. The fund did not make any promises to petitioner. Petitioner was not employed by the fund. The Act provides that the Secretary of the Treasury shall withhold the deductions

> "and said sums shall be transferred on the books of the Treasury Department to the credit of a special fund to be known as 'the civil service retirement and disability fund' and said fund is hereby appropriated for the payment of annuities, refunds, and allowances as provided in Sections 691 to 693 and 697 to 731 of this title." (Title 5 U. S. C., Section 719.)

It will be observed that as soon as, and as fast as, these sums are transferred on the books of the Treasury Department to this particular fund, they are simultaneously appropriated for the payment of these annuities. We do not agree that petitioner's judgment would have to be satisfied out of the ordinary revenues of the Government after the judgment is reported to Congress for appropriation. Under the Statute above quoted, an appropriation has already been made. If those in charge of the fund desire that an annuity certificate be issued before payment is made, there should be little difficulty in obtaining such certificate if the judgment which petitioner obtained in the District Court is permitted to stand. In a somewhat similar situation which was presented to this Court in the case of

Miguel v. *McCarl*, 291 U. S. 442, where the Comptroller General was in possession of a voucher which this Court decided should be paid, this Court said:

> "But it is not to be supposed that, upon having his attention called to our decision, the Comptroller General will care to retain possession of the voucher or that he will interfere in anyway with its payment."

On page 12 of the Government's brief three cases are cited for the proposition that it is only where the United States is directly obligated that a contract within the meaning of the Tucker Act exists. These cases on their facts are readily distinguishable from the instant case. The *Hijo* case involved the seizure of a Spanish vessel during the war. The Government claimed the right to seize the vessel and there was nothing to indicate that the Government expected the owner of the vessel to receive any compensation for its use. The *Bigby* case was a plain tort case where the plaintiff sought to recover damages from the Government for personal injuries resulting from the negligence of the operator of an elevator in a Government building. In the *Minnesota Mutual Investment* case, the Government had collected interest on money paid into court during litigation, such collection being made under a claim of right to the interest collected. In all of these cases it plainly appeared that the Government did not expect any of the complainants to receive remuneration from any source. In none of them was there the slightest basis for the implication of a contract.

On page 13 of the Government's brief four cases are cited for the proposition that the consent of the United States to be sued in contract, express or implied, is restricted to express contracts and contracts implied in fact as distinguished from quasi contracts or contracts implied in law. The cases amply support that proposition. In each of the

four cases it was clear that, at the time of the transaction involved, the Government never intended in fact to pay the respective plaintiffs. In the *Alabama* case, the State of Alabama asserted, and the United States denied, Alabama's power to tax the Government for the privilege of selling power at Muscle Shoals. In the *Merritt* case, the Government collected money from a contractor under a claim of right and did not collect it for the benefit of the plaintiff, a sub-contractor. In the *Baltimore & Ohio Railroad Company* case, the plaintiff sued to recover from the Government for the gratuitous construction of barracks. There was nothing to indicate that at the time the barracks were constructed the plaintiff expected remuneration or that the Government expected to pay. That case would have to rest entirely upon the theory of unjust enrichment, or the theory of quasi contracts. The *Sutton* case involved a contract for public improvements and was controlled by a section of the Revised Statutes which limited such contracts of the Government to amounts actually appropriated. At this point it is not amiss to point out again that the entire civil service retirement fund is already appropriated.

The case of *Dickey* v. *Jackson* (Iowa), 165 N. W. 387-389, holds that a pension fund "when provided as part of a scheme of employment (it) would seem to include some elements of a contractual character, and is doubtless intended to encourage faithfulness of service."

The Supreme Court of Florida, in the case of *State ex rel. Holton* v. *City of Tampa*, 159 So. 292, 293, recognizes that the right to a pension may become a vested one after it has entered into a contract of employment and says: "We think that in this case the right of Holton to a pension became a vested one by reason of his having fully performed all that he was required to do under the terms of his employment as a condition precedent to his having a pension allowed to him * * *." The same case speaks of a statu-

tory contract in these terms: "Surrender of an existing right to continue to hold an office or employment for a specified term is a sufficient consideration to support a statutory contract by public authorities or by the state itself, providing that the surrender of the office or employment before the normal expiration of the term of office or employment shall entitle the one so surrendering his existing legal rights to receive thereafter for life, or for a term of years, a retirement pay in the form of a pension payment deemed sufficient to compensate the officer or employee for the loss of the rights he surrenders in consideration thereof."

In the case of *Pennie* v. *Reis*, 132 U. S. 464, this Court indicated very strongly that where a person claiming the benefit of a retirement fund has continued in service until all of the contingencies happened so as to entitle him to the benefits of the fund, he then has a vested right to such payment. The Court said:

> "Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority."

Speaking of the *Pennie* case and also of the case of *Clarke* v. *Reis*, 87 Cal. 543, 25 P. 759, the California District Court of Appeals, in the case of *Klench* v. *Board of Pension Fund Com'rs of City of Stockton*, 249 P. 46, 50, said:

> "these cases, however, at least inferentially support the view that, when the event or the contingency happens upon which the officer is entitled to receive the money provided for pensioning him as a retired officer, then, in that case, the right to be paid such money is a vested right."

In a note in 54 *American Law Reports*, page 945, numerous cases are cited for this statement: "It is, however, conceded that where any particular payment under a pension has become due, the pensioner has a vested right therein." Among the cases cited is the *Pennie* case.

In the recent volume of the *American Law Reports*, Volume 98 at page 507, appears this statement:

> "It is said in the earlier annotation that, where any particular payment under a pension has become due, it is generally conceded that the pensioner has a vested right therein. It seems from a review of the later cases that it is true not only of particular payments which have become due and are immediately payable, but also as to payments which are not immediately payable but may become due at sometime in the future, provided the conditions have all been fulfilled entitling the party to a pension, especially where official action has been taken allowing the pension. The rule may be stated to be that when it has been determined that an officer is entitled to a pension and the pension has been officially allowed, or when the event happens upon which the granting of the pension is dependent, the pension thereupon becomes vested and cannot afterwards be revoked or impaired. This rule is supported by the following authorities, in addition to the authorities cited in the earlier annotations (numerous cases cited)."

Strong cases in support of the vested right theory are:

Kavanagh v. *Police Pension Fund Com'rs*, 134 Cal. 50, 66 P. 36.

Smith v. *Alkin*, 80 Mich. 205, 45 N. W. 136.

Hermanson v. *Board of Pension Com'rs of City of Los Angeles* (*Cal.*) 20 P. (2d) 774.

Lage v. *City of Marshalltown* (*Iowa*), 235 N. W. 761(2).

Gibbs v. *Minneapolis Fire Department Relief Assn.* (*Minn.*), 145 N. W. 1075.

Stevens v. *Minneapolis Fire Department Relief Assn.*, 124 Minn. 381, 145 N. W. 35.

In the *Stevens* case the court said:

> "The situation is wholly unlike the ordinary pension, such as that granted by the Federal Government to dependent soldiers of the Civil War; for there the pension is a mere gratuity or bounty which may be taken away at any moment. * * * In the case at bar, the pension fund is created in part by the payment of dues by the members of the fire department, who may ultimately become pensioners, and the rights acquired by the firemen are analogous to those possessed by members of mutual benefit societies (28 Cyc. 555). We therefore hold that the pension in question is not, as contended by the appellant, a mere gratuity to be granted or withheld at the whim or pleasure of the association."

In the *Stevens* case the suit was against the association for the amounts maturing after the association had, without notice to the plaintiff, determined that he had fully recovered and had discontinued his payments. The plaintiff was permitted to recover, the court going further and recognizing the rule that the action of the association, if clearly arbitrary, would not have been conclusive even if plaintiff had been given notice and an opportunity to be heard.

In answer to the Government's argument that petitioner served only a short while after the Act was amended favorably to him, it should suffice to say that had the Act been amended unfavorably to him a day or so before the contingencies happened, he would have been bound by such unfavorable amendment. See *Clarke* v. *Police Life & Health Insurance Board*, 123 Cal. 24, 55 P. 576; and *Pennie* v. *Reis*, *supra*.

This Court in the case of *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 646, held that the Government can be sued under the Tucker Act in all cases where property to which the Government asserts no title is taken pursuant to an Act of Congress as private property to be applied for public uses. The Court said that the law will imply a promise to make compensation because the Government asserts no title to the property and pointed out that such an implication is consistent with the constitutional duty of the Government as well as with common justice.

Petitioner hardly needs to rely upon any implied promise of the Government. We think it is clear that all of his rights which are expressly set out in the Retirement Act are to be discharged by the Government itself out of the fund which is completely controlled by the Government.

We do not agree with the Government's argument (page 28) that the petitioner's rights will be adequately protected by returning to him the amounts which he has paid or by conceding to him a life annuity of $555.60. To hold that his rights would be protected by this offer or the payment of an annuity in this amount would be to hold that he has no rights. If he does have rights, they are to be determined by and ascertained from his contract, of which Section 8(a) of the Act of June 16, 1933, providing for a thirty-year annuity is a vital part.

III.

The District Court Has Jurisdiction Under the Tucker Act Because the Suit Asserts a Claim Founded Upon a Law of Congress.

In the case of *United States* v. *Hvoslef*, 237 U. S. 1, the plaintiff was suing for the refund of an amount paid for stamp taxes imposed by the Revenue Act of 1898. The two sections of the Act upon which the plaintiff based his

case provided in substance that claims for the refunding of any tax alleged to have been erroneously collected may be presented to the Commissioner of Internal Revenue and that the Secretary of the Treasury was authorized and directed to pay out of any monies of the United States, not otherwise appropriated, to such claimants as should present their claims and should establish such erroneous collection, any sums paid by them to the United States. This Court held that the suit was maintainable under that law of Congress, saying:

> "It thus appears that the Act of 1912, upon which the present claim is based, was the culmination of a series of statutes which leave no question as to the intention of Congress to create an obligation on the part of the United States in favor of those holding the described claims and it follows that these claims must be deemed to be founded upon a 'law of congress' within the meaning of the provisions of the Tucker Act * * *."

In the case of *Medbury* v. *United States*, 173 U. S. 492, the plaintiff based her case upon Section 2 and Section 3 of the Act of June 16, 1880, which are in part as follows:

> "Section 2 * * * and in all cases where parties have paid double the minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof or to his heirs or assigns."

Section 3 authorizes the Secretary of the Interior to make the payments provided for in the Act out of any money in the Treasury not otherwise appropriated, and by Section 4 the Secretary is authorized to draw his warrant on the Treasury in order to carry the provisions of the Act into effect. This Court held that the suit was maintainable under the theory that it was founded upon a law of Congress.

In the case of *McLean* v. *United States*, 226 U. S. 374, the suit was brought on the theory that it was founded on a law of Congress, namely, a private relief act passed February 24, 1905, directing the accounting officers to settle and adjust to widow McLean all back pay and emoluments that would have been due and payable to her husband as a major and providing that the amount found due by said adjustment was thereby appropriated to be paid out of any money in the Treasury not otherwise appropriated. This Court held that the suit was properly brought.

In the recent case of *Baltimore Mail Steamship Co.* v. *United States*, 76 F. (2d), 582 (C. S. A. 4th), certiorari denied October 14, 1935, No. 198, the court said:

> "Cases illustrating jurisdiction under the Tucker Act because of some other statute creating a right to sue the United States are easily found."

The court cited the *Hvoslef* case *supra* and *United States* v. *Emory, Bird, Thayer Realty Co.*, 237 U. S. 28. See also the case of *United States* v. *American Tobacco Company*, 166 U. S. 468, where the act which was held sufficient upon which to base a suit against the Government under the Tucker Act provided merely that: "The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any Internal Revenue Act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, * * *."

We submit that in all of the foregoing cases the intention of Congress to create an obligation resting upon the United States was less clearly expressed than in the Retirement Legislation.

Furthermore, this Court has pointed out that "the great act of justice embodied in the jurisdiction of the court of

claims" is not "to be construed strictly and viewed with an adverse eye."

United States v. *Emory, Bird, Thayer Realty Company, supra.*

IV.

Petitioner's Suit is Not "Brought to Recover Fees, Salary, or Compensation for Official Services."

The Tucker Act excludes from the jurisdiction of the district courts suits brought to recover fees, salary, or compensation. The Government's brief indicates that petitioner must contend that the annuity which he seeks is either a pension or deferred compensation (page 16). We do not think that petitioner is confined to this dilemma any more than the holder of a war risk insurance contract would be. It could as logically be contended that such an insured in claiming the benefits of his policy is seeking either a pension (because of the extremely favorable premium charged) or deferred compensation for his services as a soldier, but this Court, in the *Lynch* case, *supra,* held and all of the Courts, we believe, hold that such contracts are valid.

The Tucker Act uses the words: "fees, salary or compensation." Fortunately, we can turn to the Retirement Act itself to ascertain the meaning of a phrase almost identical. The Retirement Act provides that when the annuity begins "all salary, pay, or compensation" shall cease. Section 6, Act of May 22, 1920, Title 5 U. S. C. 715; section 2, Act of July 3, 1926, Title 5 U. S. C., section 692a. In other words, the Retirement Act itself differentiates between the annuity and "salary, pay or compensation."

The case of *State ex rel Haberlan* v. *Love,* 89 Neb. 149; 131 N. W. 196 holds that an Act of the Legislature of 1895 which provides that cities shall pension all firemen after

twenty-one years of service by paying them 25% of their former salary, does not contravene Section 16, Article 3, of the Nebraska Constitution which reads:

> "The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into."

The court said:

> "And a pension granted to a fireman, who has served since the law became effective, cannot be said in reason to be a gratuity, nor the grant of extra compensation."

The case of *Pennie* v. *Reis*, 80 Cal. 266, 22 P. 176, also holds that retirement annuities are not "extra compensation."

It is the same type of annuity which is purchasable from ordinary insurance companies. Of course, like war risk insurance, it is much more favorable to the insured than the usual insurance contract. We are not concerned with the Government's policy in providing these annuities but undoubtedly much can be said for the wisdom of the retirement plan.

As a striking instance of the similarity existing between these annuities and the ordinary insurance contract, we quote the following language from Section 4 of the Act of July 3, 1926, as amended by the Act of May 29, 1930, found in Title 5, U. S. C. Section 694a:

> "And provided further, That any employee at the time of his retirement may elect to receive, in lieu of the life annuity herein described, an increased annuity of equivalent value which shall carry with it a proviso that no unexpended part of the principal upon the annuitant's death shall be returned."

Petitioner has elected to receive an increased annuity under the forfeiture proviso under Section 4 of the amendatory law. (R. 5.)

V.

Congress Never Intended that the Decision of the Bureau of Pensions, Later the Veterans Administration, Later the U. S. Civil Service Commission, Should be Final, Especially Where, as in This Case, Such Decision is Made on Undisputed Facts.

In the *Medbury* case *supra*, this Court held that the decision of the Secretary of the Interior in refusing to make payment where parties had paid double the minimum price for land, which was afterwards found not to be within the limits of a railroad land grant, was not conclusive. It will be observed that the Secretary of the Interior was to pass upon the claim in that case and that the same official was to pass upon claims of annuity under the Retirement Act after the Commissioner of Pensions had taken his final action on such claims. This Court in the *Medbury* case held that the Court of Claims had jurisdiction because the statute which created the right to have repayment under the facts therein stated gave no remedy for a refusal on the part of the Secretary to comply with its provisions. The Court said "We cannot suppose that Congress intended in such cases to make the decision of the Secretary final when it was made on undisputed facts."

In the *McLean* case *supra*, where the proper accounting officers were directed to settle and adjust to widow McLean all back pay and emoluments that would have been due to her husband and the claim was presented to the Auditor of the War Department where it was disallowed in part and where such disallowance was confirmed by the Comptroller of the Treasury, thus giving to the claimant what appears to be a right of appeal from one officer to another, such as

exists under the Retirement Act, giving a right of appeal from the Commissioner of Pensions to the Secretary of the Interior, this Court held that such action of these two officers in settling and adjusting the matter was not final and that jurisdiction lay in the Court of Claims.

Again in the case of *United States* v. *American Tobacco Company,* 166 U. S. 468, it appears that petitioner's claim was unfavorably passed upon by the Internal Revenue Collector and thereafter the Treasury Department rendered its decision declining to allow the claim and thereafter rendered another decision declining to grant a rehearing, yet this Court held that the suit could be maintained in the Court of Claims. The statute in that case provided that the Commissioner of Internal Revenue could, upon receipt of satisfactory evidence of the facts, make allowance for or redeem revenue stamps purchased but not used.

In the case of *United States* v. *Emory, Bird, Thayer Realty Co. supra* which was a suit under the Tucker Act brought in the District Court to recover the amount of taxes paid under protest, it was contended that the only remedy was a suit against the Collector. This Court held that the District Court had jurisdiction. The Court said:

> "It is true that this tax law provides that 'all laws relating to the collection, remission and refund of Internal Revenue taxes, so far as applicable,' etc., are extended to this tax (Section 38, 36 Stat. at L. 117, Chap. 6), but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law."

VI.

Petitioner is Not Limited to a Proceeding for Mandamus.

In the recent case of *Miguel* v. *McCarl,* 291 U. S. 442, it was contended that mandamus should not have been brought

in that case because the petitioner had a right to sue in the Court of Claims for his retired pay. It is true that this Court found no merit in that contention, but it seems that under the facts of this case it would, in the language of the late Justice Holmes in the *Emory, Bird, Thayer Realty Company* case *supra:* "—be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims."

Fortunately, this identical question has been decided in the case of *Hayes* v. *Mayor and Council of City of Hoboken,* 93 N. J. L. 432, 108 A. 868(3). The Court said:

> "Next it is said the plaintiff was without right to enforce her claim by a common-law action, but was limited to a proceeding by mandamus. There seems to be nothing in this point. She may proceed by mandamus, but she is not compelled to resort to that remedy. If mandamus had been applied for, and the Court in its discretion had refused the writ, it is clear the plaintiff could even then pursue her common-law remedy. *Clarke* v. *Earle,* 42 N. J. Law 94, 97. She may be compelled to enforce her judgment by mandamus, but her right to a trial by jury is not affected thereby."

VII.

The Court Properly Rendered a Declaratory Judgment.

Petitioner's claim is not in excess of $10,000.00. He sought and obtained a judgment for monthly installments accruing to date of judgment. The judgment is in the amount of $1476.45. The Court also declared that future installments, under the present contract, would fall due monthly. That is the only natural and logical result from the judgment in petitioner's favor. If he had a valid contract on the date of judgment and nothing had happened to invalidate that contract, future installments would auto-

matically fall due with or without a declaratory judgment. And, if in the future anything should happen to invalidate the contract, such new defense could no doubt be made to appear when application would have to be made to the Court for coercive relief.

28 *U. S. C.* 400.

Nor does it follow that since petitioner has a life expectancy of 15.39 years, the jurisdictional limitation of the District Court has been exceeded. The trial court may have seen petitioner and have concluded that he could not be expected to live out his expectancy. The trier of fact is not bound by the mortality tables.

VIII.

On the Merits of the Case, Petitioner as a Field Deputy Marshal was an Employee of the United States.

Petitioner feels that this point was adequately covered in his brief in support of petition for writ of certiorari. He desires, however, to reply briefly to the argument in the Government's brief at page 32 to the effect that time served by a field deputy marshal is not within the purview of the Retirement Act because of Section 3 of the Act of May 29, 1930, which reads:

> "Provided, that these groups shall include only those employees whose tenure of employment is not intermittent nor of uncertain duration."

We fail to see any basis for a contention that the employment of petitioner as a field deputy marshal was intermittent or of particularly uncertain duration. He served as a field deputy continuously for six years, four months and fourteen days (R. 14). Of course, he could have been removed from office as most other employees can. As appears from page 31 of the Government's brief, prior to the Act

of May 28, 1896, he was removable from office by the Judge of the District or Circuit Court and, after the passage of that Act, he held office during the pleasure of the marshal, unless sooner removed by the District Court.

It is doubtful, however, whether the above quoted proviso from Section 3 of the Act of May 29, 1930, has any application to service rendered prior to the effective date of the Retirement Act in 1920. The quoted proviso would seem to refer only to unclassified employees of the United States in all cities and in all establishments or offices in which appointments are made under labor regulations approved by the President or from sub-clerical or other registers for the classified service, and unclassified employees transferred from classified positions, which are the only groups mentioned in sub-section (d) of Section 693a of Title 5, U. S. C. Certainly the quoted proviso does not apply to subsection (c), because it has a similar provision of its own.

The Act specifically provides that the period of service "shall be computed from the date of original employment, whether as a classified or an unclassified employee in the Civil Service of the United States * * *, including periods of service at different times and in one or more departments, branches, or independent offices, or the legislative branch of the Government, and also periods of service performed overseas under authority of the United States, and periods of honorable service in the Army, Navy, Marine Corps or Coast Guard of the United States; * * * all periods of separation from the service, and so much of any leaves of absence as may exceed six months in the aggregate in any calendar year, shall be excluded, except * * *." (Section 5 of the Act of May 29, 1930, Title 5, U. S. C. 695a.)

It appears, therefore, that petitioner is entitled to credit for service rendered as a field deputy marshal from the date of his original employment, although such service was

rendered as an unclassified employee. It appears, too, that even if he had not served continuously as a field deputy and had been separated from the service for intervals, he nevertheless would get credit for the time he actually served.

Statutes of this general type are to be liberally construed.

O'Dea v. *Cook*, 169 P. 366 (1), 176 Cal. 659.
Klench v. *Stockton*, 249 P. 46 (Cal. Appeals).
43 *C. J. P.* 813, Sec. 1408.

Conclusion.

We respectfully submit, therefore, that the judgment of the Fifth Circuit Court of Appeals should be reversed, so that the finding in petitioner's favor in the District Court can stand.

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